

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

RICHARD GALLO,

Plaintiff,

v.

JACKIE CRAWFORD,

Defendant.

2:03-CV-1548-RCJ-LRL

**ORDER**

This matter comes before the Court on Defendant Jackie Crawford's ("Crawford") Motion to Dismiss (#44) and Motion to Strike Plaintiff's Response to Defendant's Reply (#54), as well as Plaintiff Richard Gallo's ("Plaintiff") Motion for Judgment on the Pleadings. (#55.) The Court has considered the Motions, the pleadings on file, and oral arguments on behalf of the parties. Pursuant to the following analysis, the Court grants Crawford's Motion to Dismiss and denies Crawford's Motion to Strike as moot. The Court further denies Plaintiff's Motion for Judgment on the Pleadings.

**BACKGROUND**

Plaintiff is a prisoner at the Southern Desert Correctional Center ("SDCC"). On December 5, 2003, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983, naming Crawford, Director of the Nevada Department of Corrections, in her individual capacity. Plaintiff also filed his Amended Complaint on March 17, 2004. Plaintiff alleges that Crawford violated the Takings Clause and the Due Process Clause of the Fifth and

1 Fourteenth Amendments to the United States Constitution. Specifically, Plaintiff argues that  
2 Crawford violated his constitutional rights by refusing to tender to Plaintiff interest earned on  
3 his various inmate bank accounts and by transferring such interest to the General Inmate  
4 Trust Fund. Plaintiff seeks declaratory and injunctive relief. Plaintiff also seeks \$100,000 in  
5 compensatory damages and \$200,000 in punitive damages.

6 On December 23, 2003, the Court denied Plaintiff's application to proceed in forma  
7 pauperis and ordered Plaintiff to pay a \$150 filing fee within thirty days. On January 26,  
8 2003, the Court granted Plaintiff an additional thirty days to pay the filing fee. Subsequently,  
9 on March 2, 2004, the Court ordered the Complaint filed and gave Plaintiff 120 days to serve  
10 Crawford. Plaintiff then petitioned the Court to have the U.S. Marshals serve Defendant. The  
11 Court denied that motion on April 22, 2004.

12 Plaintiff later alleged that he mailed a copy of the Complaint as well as a Waiver of  
13 Service of Summons to Defendant via first class certified mail on May 5, 2004. On August  
14 11, 2004, Plaintiff moved for default judgment. On August 17, 2004, the Court issued a  
15 Notice Regarding Intent to Dismiss Pursuant to Rule 4(m) of the Federal Rules of Civil  
16 Procedure unless Plaintiff filed proof of service with the Court on or before September 10,  
17 2004.

18 On October 12, 2004, this Court dismissed Plaintiff's motion for default judgment  
19 and gave Plaintiff an additional sixty days from the date of the order to properly serve  
20 Crawford. The Court again extended Plaintiff's time to serve Crawford until December 13,  
21 2004. On November 29, 2004, Plaintiff filed a Motion for Enlargement of Time to effect  
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1 service on Crawford. The Court granted Plaintiff's Motion and gave Plaintiff until January  
2 18, 2005 to complete service.

3 Plaintiff contracted with Process Servers, Inc. to serve Crawford as well as the  
4 Attorney General. Process Servers served a courtesy copy to the Attorney General and claims  
5 to have served Ashlee Hernandez, a Nevada Department of Corrections employee, on  
6 December 20, 2004. Plaintiff also contends that he served Crawford on March 21, 2005.  
7 Crawford claims that this attempted service was effectuated upon Suzie Cochran, a Nevada  
8 Department of Corrections employee. Plaintiff does not dispute Crawford's claim.

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10 On April 14, 2005, Plaintiff filed his Motion Requesting Full Restitution from  
11 Defendant for Service of Process Cost and Order for Judgment by Default. (#26.) In his  
12 Motion, Plaintiff asked the Court to order Crawford to pay \$135 in restoration to Plaintiff for  
13 service costs. Plaintiff also sought default judgment in his favor and alleged that Crawford  
14 failed to properly answer his Complaint. On June 17, 2005, the Court denied Plaintiff's  
15 motion for restitution and default judgment because Plaintiff failed to properly and timely  
16 serve Crawford. (#32.) Plaintiff then filed his Motion for Reconsideration. (#35.) In its  
17 order denying Plaintiff's motion for reconsideration, the Court stated that "the defendant shall  
18 have thirty (30) days within which to file a response to the complaint, which may include the  
19 assertion by motion of any defense under Rule 12(b) of the Federal Rules of Civil Procedure  
20 warranted under these circumstances." (#43 at 2.) Crawford then filed the present motions  
21 asking the Court to dismiss Plaintiff's action pursuant to Federal Rules of Civil Procedure  
22 12(b)(5) and (6).  
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## DISCUSSION

Plaintiff alleges that Crawford violated the Takings Clause and Due Process Clause to the Fifth and Fourteenth Amendments. Defendant Crawford asks the Court to dismiss Plaintiff's Complaint based on two arguments. First, Crawford moves pursuant to Federal Rule of Civil Procedure 12(b)(5) to dismiss Plaintiff's claims for insufficiency of process. Second, Crawford asks the Court to dismiss Plaintiff's claims for failure to state a claim for which the Court may grant relief pursuant to Rule 12(b)(6).

### I. Crawford's Rule 12(b)(5) Motion

Crawford has asked the Court to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(5) for insufficient service of process. Federal Rule of Civil Procedure 4(e) lists the manner by which a party must perform service:

- (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State: or
- (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

In addition, "a federal court does not have jurisdiction over a defendant unless the defendant has been served properly under Fed. R. Civ. P. 4." *Direct Mail Specialists v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (citing *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)). Although Rule 4 is a flexible rule, "without substantial compliance with Rule 4 'neither actual notice or simply naming the defendant in

1 the complaint will provide personal jurisdiction.” *Id.* (quoting *Benny v. Pipes*, 799 F.2d 489,  
2 492 (9th Cir. 1986)). “When service of process is challenged, the party on whose behalf it is  
3 made must bear the burden of establishing its validity.” *Aetna Bus. Credit, Inc. v. Universal*  
4 *Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir. 1981) (citing *Familia de Boom v.*  
5 *Arosa Mercantil, S. A.*, 629 F.2d 1134, 1139 (5th Cir. 1980)).

6 Plaintiff does not contend that he served Crawford personally or by leaving copies of  
7 the Complaint or other pleadings at Crawford’s “dwelling house.” Plaintiff’s only contention  
8 is that he served Crawford’s authorized agent. Specifically, Plaintiff argues that he complied  
9 with the service requirements when he served Ashlee Hernandez or Suzie Cochran, both  
10 Nevada Department of Corrections employees. However, as this Court has already noted in a  
11 prior order (#32 at 4-5), these individuals are not authorized to accept service on Crawford’s  
12 behalf. In addition, Plaintiff argues that he properly served the Nevada Attorney General’s  
13 office. However, just as with the deficient service mentioned above, Plaintiff did not serve  
14 the individuals authorized by statute to accept service on Crawford’s behalf at the Attorney  
15 General’s office. *See Nev. Rev. Stat. § 41.031(2)* (listing the parties authorized to accept  
16 service in an action against the state of Nevada).

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18 This Court has already held that Plaintiff did not properly effectuate service. (#32.)  
19 Since that prior order, Plaintiff has not corrected his deficient service. Even if Plaintiff had  
20 actually served Crawford’s authorized agents, his service was untimely. As mentioned  
21 above, this Court has generously extended Plaintiff’s deadlines to properly serve Crawford.  
22 Over 800 days have passed since the original deadline for service expired. Plaintiff’s last  
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1 purported service occurred two months past this Court's final extended deadline.

2 Accordingly, the Court grants Crawford's Motion to Dismiss pursuant to Rule 12(b)(5).

3 **II. Crawford's Rule 12(b)(6) Motion**

4 Because Plaintiff failed to properly serve Crawford, this Court lacks jurisdiction over  
5 her. *See, e.g., Direct Mail Specialists v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688  
6 (9th Cir. 1988) (stating that "a federal court does not have jurisdiction over a defendant  
7 unless the defendant has been served properly under Fed. R. Civ. P. 4"). Therefore, the Court  
8 refrains from reaching the merits in this case and from ruling on Crawford's Motion to  
9 Dismiss as it relates to Rule 12(b)(6).  
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11 **III. Crawford's Motion to Strike**

12 Crawford has also asked the Court to strike document #54 because it is not permitted  
13 under Local Rule 7-2. Document #54 is Plaintiff's Opposition to Defendant's Reply, which  
14 Crawford correctly states is not permitted under Rule 7-2. However, Plaintiff is acting pro-se  
15 and such an oversight is understandable. However, the Court need not address this issue  
16 because it dismisses Plaintiff's claims. Thus, this issue is moot.

17 **IV. Plaintiff's Motion for Judgment on the Pleadings**

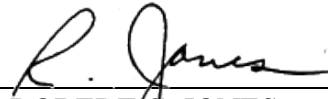
18 As noted above, the Court dismisses Plaintiff's claims pursuant to Rule 12(b)(5).  
19 Accordingly, the Court denies Plaintiff's Motion for Judgment on the pleadings as moot.  
20 Because Plaintiff has failed to properly effectuate service, the Court lacks jurisdiction over  
21 Defendant Crawford. *Direct Mail Specialists*, 840 F.2d at 688.  
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**CONCLUSION**

Pursuant to the above analysis, the Court grants Defendant Crawford's Motion to Dismiss. (#44.) The Court dismisses Plaintiff's claims pursuant to Rule 12(b)(5).

Accordingly, IT IS HEREBY ORDERED that Crawford's Motion to Dismiss (#44) is *granted* and Crawford's Motion to Strike is *denied as moot*. Further, Plaintiff's Motion for Judgment on the Pleadings is *denied*.

DATED: March 5, 2007.



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ROBERT C. JONES  
UNITED STATES DISTRICT JUDGE